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IN THE

# Supreme Court of the United States

Supreme Court, U.S.
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October Term, 1969
No. 374

HAYWOOD WASHUM, an Individual, d/b/a LOS ANGELES-YUMA FREIGHT LINES, and SVENSSON FREIGHT LINES, an Arizona Corporation,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CONSOLIDATED COPPERSTATE LINES, CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, HOPPER TRUCK LINES, LEE WAY MOTOR FREIGHT, INC., MILNE TRUCK LINES, INC., NAVAJO FREIGHT LINES, INC., PACIFIC MOTOR TRUCKING COMPANY, THUNDERBIRD FREIGHT LINES, INC., T.I.M.E. FREIGHT, INC., and WESTERN GILLETTE, INC.,

*Appellees.*

**On Appeal From the United States District Court for the District of Arizona.**

## MOTION TO AFFIRM.

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*Appellees.*

**On Appeal From the United States District Court for the District of Arizona.**

## MOTION TO AFFIRM.

Pursuant to Rule 16.1(c), The Supreme Court of the United States Revised Rules (1967), Consolidated Copperstate Lines, Consolidated Freightways Corporation of Delaware, Hopper Truck Lines, Lee Way Motor Freight, Inc., Milne Truck Lines, Inc., Navajo Freight Lines, Inc., Pacific Motor Trucking Company, Thunderbird Freight Lines, Inc., T.I.M.E. Freight, Inc.[1] and

[1]Subsequent to initiation of the case by Appellants the name of the corporation has been changed to T.I.M.E.-DC, Inc.

Western Gillette, Inc., corporations (hereafter referred to collectively as "Intervening Defendants"), Appellees herein, move that the judgment of the District Court be affirmed.

## Statement.

This case involves a direct appeal from a final judgment of a Three-Judge District Court affirming orders of the Interstate Commerce Commission in an action brought by Appellants Haywood Washum, an individual doing business as Los Angeles-Yuma Freight Lines (hereafter referred to as "LAY") and Svensson Freight Lines, an Arizona corporation (hereafter referred to as "Svensson"), a copy of which is attached to the Jurisdictional Statement (hereafter referred to as "J.S.") of the Appellants as Appendix A. The background of the case is adequately stated in the reports of the Commission (J.S., App. B) and only a brief summary will be made in this motion for purposes of describing the order of events and the present posture of the instant appeal.

The Intervening Defendants filed a Complaint (hereafter referred to as "Complaint Proceeding") with the Commission on August 12, 1960, charging the Appellants herein with violations of Section 206, and subdivision thereof, and of Section 5(4) of the Interstate Commerce Act (hereafter referred to as the "Act"), (49 U.S.C.A. §§306 and 5[4], respectively), and prayed that the Commission order Appellants to cease and desist from unlawful operations and to declare the

purported Certificate of Registration of Svensson terminated by operation of law. Thereafter, Appellant Svensson filed an application with the Commission seeking the issuance of a certificate of public convenience and necessity, pursuant to Section 207 of the Act, authorizing operation as a common carrier by motor vehicle in interstate and foreign commerce between specified points in Arizona (hereafter referred to as "Certificate Proceeding"); and Appellant Haywood Washum filed an application, pursuant to Section 5 of the Act, for authority authorizing the purchase by Svensson of the interstate operating rights, transportation business and physical property of LAY, with resulting control by Haywood Washum of the resulting operations of Svensson (hereafter referred to as "Finance Proceeding").

The Complaint and Certificate Proceedings were assigned by the Commission for hearing before Joint Board No. 47, composed of E. T. "Eddie" Williams of Arizona and George E. Howard of California, and the Finance Proceeding was assigned to Hearing Examiner Samuel C. Shoup of the Commission. The California member of the Joint Board failed to appear at the hearing and the membership of Joint Board No. 47 actually participating in the proceedings consisted of the Arizona member, pursuant to the provisions of Section 205(b) of the Act (49 U.S.C.A. 305[b]). All three matters were heard on a consolidated record on May 8 through 11, 1967, and separate but entirely consistent recommended reports and orders of the Joint Board in

the Complaint and Certificate Proceedings and of the Hearing Examiner in the Finance Proceeding were served on October 20, 1967. All were unfavorable to the Appellants, who filed Exceptions thereto. Intervening Defendants replied to the Exceptions, and by Decision and Order of April 25, 1968, the Commission, by Division 3, adopted said recommended reports and orders as the orders of the Commission. Appellants thereupon filed a petition for further hearing and for reconsideration of said Decision and Order, which the Commission, by Division 3 acting as an Appellate Division, denied by Order of July 24, 1968. At that time these orders became administratively final.

On or about October 29, 1968, the Appellants filed the within action in the United States District Court for the District of Arizona, entitled Complaint and Petition for Temporary Restraining Order and Injunction, seeking to annul the above-described orders of the Commission and for temporary restraint of the order of the Commission in the Complaint proceeding. Such Commission order, by a series of orders of the District Court, has been restrained pending disposition of the appeal before this Honorable Court or further order of the District Court.

The original Complaint filed with the District Court, other than matters in justification of the request for a temporary restraining order, alleged only that the recommended reports and orders of Joint Board No. 47 and Examiner Samuel C. Shoup, as well as subsequent orders

of the Commission affirming such recommended reports and orders and denying further hearing, were arbitrary, capricious, unlawful and unreasonable, in light of the evidence adduced at the consolidated hearing. On or about December 6, 1968, the Appellants filed with the District Court a pleading entitled "Plaintiffs' Motion to Amend Complaint and for Leave to Present Additional Evidence To Court". The Amendment which was proferred by the Motion alleged that the member of Joint Board No. 47 who heard the case, along with the Hearing Examiner of the Commission, was biased and prejudiced and that, accordingly, the Appellants were denied a fair and impartial hearing and due process of law, all allegedly in violation of said Fourteenth Amendment. Attached to said Motion was the Affidavit of Appellant Haywood Washum reciting certain alleged facts relating to the alleged bias of the Joint Board member, which the affiant conceded to have been known to him on the first day of the hearing, divulged to his attorney at that time and a conscious determination made not to raise such issue. At no time in the proceedings before the Commission was such issue of alleged bias and prejudice ever raised.

In the Opening Brief of the Appellants before the District Court it was urged that the evidence did not justify a finding of common control among the Appellants in violation of Section 5 of the Act, that traffic previously handled by Svensson purportedly under its Certificate of Registration, together with the testimony of some

ten shipper witnesses, required the grant of the Certificate Application, that allegedly the Intervening Defendants had failed to establish that they would be adversely affected by the grant of the Certificate and Finance Applications, and that the denial of such applications was predicated upon the finding of common control by Joint Board No. 47, which was then alleged to be non-existent. The Reply Brief of Appellants related entirely to argument urging a purported lack of unlawful common control among the Appellants. Thereafter, the District Court, by its Order filed April 1, 1969, unanimously denied the Motion of Appellants and dismissed the Complaint filed with the Court.

In its J.S. the Appellants have now abandoned their basic and principal contention before the Commission and the District Court and state that they no longer take issue with the findings of the Commission with respect to the unlawful control of the Appellants in violation of Section 5 of the Act, but only with the alleged failure of the Commission to find that such conduct was not willful and wanton in nature (J.S., p. 5). They then state the issues before this Honorable Court to be as follows:

> "Whether the Interstate Commerce Commission may abandon a long-standing rule of practice before the Commission and apply to the Appellants a different rule not heretofore applied in motor carrier cases whereby the Certificates of the Appellants are revoked and the sale of a Certificate is denied, with the effect that Appellants are simply put out of business."

## ARGUMENT.

1. The major position presently of the Appellants is that the Commission has improperly and without regard to precedent acted affirmatively to put the Appellants out of business by revoking the Certificates (sic) of the Appellants. This simply is not so. Even a cursory examination of the reports and orders of the Commission attached to the J.S. as Appendix B will reveal that there is no proceeding before the Commission seeking to revoke any of the operating authority of LAV. Other than to deny Haywood Washum authority to transfer his interstate operating authority and properties to Svensson, pursuant to Section 5 of the Act, with resulting control in himself, the Commission has issued no order whatsoever relating to LAV. LAV continues to be free to operate its interstate motor carrier business to the full extent of its operating authority and facilities. With the final termination of the Certificate of Registration of Svensson, undoubtedly even the consolidation of LAV operating authority and properties with the properties and Arizona intrastate operating authorities of Svensson may be accomplished by the filing of an appropriate application with the Commission pursuant to Section 212(b) of the Act.

So far as Svensson is concerned, the Commission has not undertaken to revoke, in the sense that such term is normally used, the Certificate of Registration of Svensson but, rather, to recognize officially the fact that such Certificate of Registration was either void on issuance or subsequently voided under the provisions of Section 206(a)(6) and (7) of the Act. The reason for such result follows from the fact that LAV is a multi-state motor common carrier authorized to provide

service between points in California and Arizona (J.S., A 33-35) and Svensson is the holder of a purported Certificate of Registration (J.S., A 35-37), the issuance and retention of which is dependent upon its motor carrier operations being limited to those wholly within the boundaries of the State of Arizona and not controlled by, controlling, or under a common control of a carrier engaged in operations outside of such State. Section 206(a)(6) and (7) of the Act. Such Certificate of Registration was issued to Svensson on June 10, 1964 (J.S., A 35), as the result of an application filed with the Commission on February 4, 1963, for a grandfather certificate of registration, verified by its President, Don Washum, in which it was represented to the Commission that no such common control existed. (J.S., A 27). The Appellants now judicially admit that the findings of the Commission of such unlawful common control between LAV and Svensson are correct, despite their earlier protestations (J.S., p. 4). Indeed, in view of the record herein and the determinations made by this Court in *Gilbertville Trucking Co., Inc., et al. v. United States*, 371 U.S. 115, 9 L. Ed. 2d 177, 83 S. Ct. 217 (1962), as to the criteria to be applied under Section 5, and subdivisions thereof, of the Act relating to common control where there are family relationships, they were left with no alternative. They complain only as to the failure of the Commission to find that such violations were willfully and wantonly in violation of Section 5 of the Act (J.S., p. 4). In view of the written admission of such common control by Don Washum (President of Svensson) on January 12, 1964 (J.S., A 25), as well as other evidence, the Commission well could have made such a finding if it

had not concluded that such finding was not necessary to dispose of the issues before the Commission (J.S., A 27).

It is crystal clear, under the provisions of Section 206(a)(6) and (7) of the Act, that the issuance of a Certificate of Registration is dependent upon the fact that there is no common control with a multi-state carrier and that the applicant is not operating outside of the single State. *Homer White, Inc. v. United States*, 281 F. Supp. 430 (1968). Accordingly, the purported Certificate of Registration was void from its inception and without regard to whether or not Svensson intended to mislead the Commission as to the true facts. Where common control exists between a single-state carrier and a multi-state carrier the termination of the Certificate of Registration results from the provisions of Section 206(a)(6) and (7) of the Act *Homer White, Inc. v. United States* (*supra*). With the judicial admission by Appellants conceding the correctness of the Commission's findings and conclusions relating to common control there simply is left no justiciable issue before this Honorable Court with respect to the correctness of the order of the Commission (J.S., A 32).

2. The second aspect of the question raised by Appellants with the Court is whether or not the Commission has failed to properly evaluate the evidence of record relating to the Certificate Proceeding. In this respect, the Appellants urge that the Commission did not properly evaluate evidence of past operations of Svensson under its purported Certificate of Registration or make findings with respect to the adverse results which would flow to the Intervening Defendants by the granting of such application. The record shows

that the Joint Board, as affirmed by Division 3, considered in considerable detail the shipper testimony (J.S., A 43-48). It also considered the existing operations of other motor common carriers at some length (J.S., A 48-56). Finally, the Joint Board considered the adverse affect of the present and proposed operations of Svensson on the existing motor carriers, especially in view of the insufficiency of available traffic (J.S., A 48-56). The Joint Board, as affirmed by Division 3, properly found that Svensson had failed to establish that evidence of past operations even fell within the scope of its purported Certificate of Registration and that the Certificate Proceeding encompassed a proposed certificate under Section 207 materially different from the purported Certificate of Registration (J.S., A 57). The Hearing Examiner of the Commission, also as affirmed by Division 3, made a similar finding in the Finance Proceeding (J.S., A 8). Thus, it is patent that the Commission considered and evaluated all of the evidence of record proffered by the Appellants relating to public convenience and necessity.

What the Appellants actually seek herein is to have the Court re-weigh all of the evidence of record relating to public convenience and necessity and reach its own determination of the same when such function properly lies with the Commission. It is fundamental that the scope of judicial review of administrative proceedings is to verify that there is substantial evidence on the record, viewed as a whole, to sustain the findings, conclusions and orders of the administrative agency. Section 10(e) of the Administrative Procedure Act, 5 U.S.C.A. §706(e). *Labor Board v. Columbian*

*Enameling & Stamping Co.*, 306 U. S. 292, 300, 83 L. Ed. 660, 59 S. Ct. 501 (1939). It is the exclusive function of the Commission to draw such reasonable conclusions from its findings as in its discretion are appropriate. *Illinois Central R. Co. v. Norfolk & Western R. Co.*, 385 U. S. 57, 66, 69, 17 L. Ed. 2d 162, 87 S. Ct. 255 (1966). The fact that the evidence permits drawing of two inconsistent conclusions does not preclude the finding of the Commission from being supported by substantial evidence. *Consolo v. Federal Maritime Commission*, 383 U. S. 607, 620, 16 L. Ed. 2d 131, 86 S. Ct. 1018 (1966). It is not for the Court to strike down conclusions that are reasonably drawn from the evidence and findings in the case but, rather, to determine whether the evidence supporting such Commission findings is substantial. *Universal Camera Corp. v. Labor Board*, 340 U. S. 474, 95 L. Ed. 456, 71 S. Ct. 456 (1951); *Illinois Central R. Co. v. Norfolk & Western R. Co.* (supra). It is significant that the Appellants in their I.S. have failed to cite any section of the Act, any rule, regulation or decision of the Commission or any decision of any Court in support of any contention advanced by them. The conclusion is inescapable that there are none.

3. Appellants refer to the Motion made in the District Court relating to the request by Appellants to present evidence of alleged bias and prejudice of the Joint Board member (I.S. p. 11). It is not clear whether they urge reversal on this ground but, in any event, it is clear that the denial of such Motion by the District Court (I.S. A. 3, 21) was proper. Appellants with knowledge of the inception of the proceeding before the Commission of any matters relating to the al-

leged disqualification of the hearing officer, as is the case herein, must timely raise such issue before the Commission. Orderly administration by the Commission and fairness to litigants before the Commission require such rule. *United States v. L. A. Tucker Truck Lines*, 344 U.S. 33, 36-37, 97 L. Ed. 54, 73 S. Ct. 67 (1952). Such rule is consistent with the general rule involving review of orders of the Commission before the Courts wherein a litigant has sought to inject evidence of various nature for the first time before the Courts. *United States v. Capital Transit Co.*, 338 U.S. 286, 291, 94 L. Ed. 93, 70 S. Ct. 115 (1949). In any event, the Appellants do not urge herein that the Commission failed to receive any material evidence proffered by it or that any material evidence was improperly received. Both the Hearing Examiner and the Joint Board made consistent findings on crucial matters, which findings, as well as the conclusions and orders of the Joint Board and the Hearing Examiner, were independently ratified and affirmed by the Commission, acting through Division 3.

## Conclusion.

The Interstate Commerce Commission has regularly pursued its duty under the Interstate Commerce Act and has made findings and conclusions therefrom fully sustained by the record before the Commission. The final orders of the Commission are entirely consistent with and required by the Findings and Conclusions of the Commission in the three proceedings before it. The fact that Appellants would have this Court reach conclusions

question which justifies further argument before this Court. For all of the foregoing reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

CONSOLIDATED COPPERSTATE LINES,
CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
HOPPER TRUCK LINES,
LEE WAY MOTOR FREIGHT, INC.,
MILNE TRUCK LINES, INC.,
NAVAJO FREIGHT LINES, INC.,
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THUNDERBIRD FREIGHT LINES, INC.,
T.I.M.E. FREIGHT, INC. and
WESTERN GILLETTE, INC.,

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